111 FERC ¶ 61,141
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Northern Natural Gas Company | Docket No. RP05-266-000

ORDER ACCEPTING TARIFF SHEETS SUBJECT TO CONDITIONS

(Issued May 4, 2005)

1. On April 4, 2005, Northern Natural Gas Company (Northern) filed revised tariff sheets[1] to modify Rate Schedules TF and TFX to give a shipper the option to obtain its full service requirements from Northern if it agreed not to bypass Northern's system. Under the proposed modification, Northern would permit the shipper to increase its contract demand at agreed-upon intervals to accommodate load growth, and construct necessary facilities to facilitate any such future contract demand increase. Northern requests a May 5, 2005, effective date for its proposed tariff sheets.

2. As discussed below, the Commission will accept Northern's revised tariff sheets subject to conditions to be effective May 5, 2005, as proposed. This acceptance benefits shippers by increasing flexibility on Northern's system.

Background

3. On February 11, 2005, Northern filed with the Commission certain non-conforming service agreements and a letter agreement for a proposed service transaction with CenterPoint Energy Minnesota Gas (CenterPoint). Several of the agreements included provisions requiring CenterPoint to take full service requirements from

[1] The tariff sheets proposed by Northern in the instant filing are: Eighth Revised Sheet No. 101, Third Revised Sheet No. 102, Fourth Revised Sheet No. 116, Fourth Revised Sheet No. 117, and Second Revised Sheet No. 308 to its FERC Gas Tariff, Fifth Revised Volume No. 1.

Northern, and provisions which prohibited CenterPoint from bypassing Northern's system. In return, Northern included provisions under which Northern agreed to provide CenterPoint with growth options, whereby CenterPoint could increase its contract maximum daily quantity (MDQ) at specified times, and by specified amounts, over the term of the contract to meet system growth. Northern also included provisions under which it agreed to construct facilities, if necessary, to accommodate any MDQ increase.

4. On March 23, 2005, the Commission issued an order accepting Northern's non-conforming agreements, subject to conditions.[2] In that order, the Commission found that Northern's FT and FTX Rate Schedules did not provide for full requirement or load growth provisions in shipper contracts and, therefore, the full requirement provision proposed was an impermissible negotiated term and condition of service different from the services offered to other customers. For the same reasons, the Commission found that Northern's proposed bypass provision and the growth provision, were also impermissible. Accordingly, the Commission determined that Northern could not include these provisions as non-conforming provisions to its agreements with CenterPoint because they presented a substantial risk of undue discrimination.[3]

5. The Commission found that that if Northern desired to provide a full requirements service, it must mitigate the risk of undue discrimination among its customers by filing to place such a service into its tariff so that it would be generally available to all customers. The Commission reasoned that this would permit all customers to choose whether to avail themselves of a full requirements option and, therefore, any anticompetitive or discriminatory aspects of a full requirement obligation could be substantially mitigated. Moreover, the Commission stated that as long as all customers have a choice to avail themselves of an alternative service such as standard firm service or interruptible service, the obligations imposed by a full requirements service are not anticompetitive.[4]

[2] *Northern Natural Gas Co.*, 110 FERC ¶ 61,321 (2005).

[3] *Id.* at P 19-21.

[4] *Id.* at P 17, *citing, Transcontinental Gas Pipe Line Corp.*, 76 FERC ¶ 61,021 at p. 61,061-63 (1996).

Details of Filing

6. Northern states that in the instant filing it proposes to add a full requirements provision as a generally available provision of Rate Schedules TF and TFX.[5] Northern states that under its proposal, if a shipper has a bona fide alternative to physically bypass Northern's system, the shipper could agree to take its full requirements from Northern for the service territory currently served by its existing entitlement and the growth associated with the service territory and agree not to physically bypass Northern. Northern states that in exchange for that agreement, a shipper and Northern may mutually agree to increase the shipper's contract demand at agreed upon intervals, to construct new facilities as necessary to accommodate such increased demand, and to exercise commercially reasonable best efforts to secure the approvals for such construction

7. Northern also states that it intends to hold open seasons for any new facilities constructed pursuant to this proposal and that it will provide service to any requesting shipper whose request meets the economic feasibility requirements for the construction of facilities. Northern states that it proposes to include this provision in its list of tariff-permitted provisions in service agreements, set forth in section 58 of its General Terms and Conditions.

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[5] Specifically, Northern proposes to add the following language to Rate Schedules TF and TFX:

> Subject to the terms of this paragraph, should a shipper have a bona fide alternative to physically bypass Northern's system, Shipper may select the full requirements option. Under such option, a Shipper will agree to take its full requirements from Northern for the service territory currently served by the existing entitlement and the growth associated with such service territory and agree not to physically bypass Northern for such service territories for the term of the agreement. In exchange for such agreement, Shipper and Northern may mutually agree to increase the Shipper's contract demand at agreed upon intervals, to construct new facilities if necessary and to exercise commercially reasonable best efforts to secure approvals for such construction. To the extent new facilities would need to be constructed to meet Shipper's growth requirements, Northern will hold open seasons for any construction required and will provide service to any requesting Shipper whose request meets the economic feasibility requirements for the construction of facilities.

Public Notice and Interventions

8. The Commission issued notice of Northern's filing on April 12, 2005. Interventions, comments, and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2004)). Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2004)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

9. Cornerstone Energy, Inc., (Cornerstone), Northern Municipal Distributors Group and the Midwest Region Gas Task Force Association (Distributors), Koch Nitrogen Company (Koch) and Terra Industries, Inc., (Terra) protested the instant filing. CenterPoint Energy Resources Corporation (CenterPoint Resources), Northern States Power Company and Northern States Power Company (Wisconsin) filed comments in support of Northern's proposal.

10. On April 14, 2005, and April 22, 2005, Northern filed answers to the protests. Generally, answers are not permitted to protests. *See* 18 CFR §385.213 (2004). However, the Commission will accept Northern's answers in order to fully develop the proposal before it. The issues raised by the parties to the instant proceeding are discussed below.

Discussion

11. Northern proposes to include in its tariff a provision to provide a full requirements service. As discussed below, the Commission accepts Northern's proposed tariff sheets subject to certain conditions.

12. Pursuant to Northern's proposal, a shipper could request service under Northern's proposed full requirements service under certain conditions. First, the shipper must show that it has a bona fide alternative to bypass Northern's system. Second, the shipper must agree to take its full requirements service and the growth associated with such service from Northern. Third, the shipper must agree not to physically bypass Northern for the term of the agreement. In return, Northern agrees to provide the shipper with its full requirements, to permit the shipper to increase its demand by mutual agreement at agreed upon intervals, to construct new facilities, if necessary and to exercise commercially reasonable best efforts to secure approvals for such construction. To the extent new facilities would need to be constructed to meet shipper's growth requirements, Northern agrees to hold open seasons for any construction required and that it will provide service

to any requesting shipper whose request meets the economic feasibility requirements for the construction of facilities.

13. Distributors assert that the Commission must reject the instant filing because it violates Commission policy. Distributors argue that in *DTI*, the Commission found that a contract provision that requires a pipeline to be a sole supplier for a customer constitutes a term and condition of service materially different than as provided under the FT Rate Schedule and did not appear to be a provision that affected only the rate for service.[6] Distributors assert that the instant proposal also goes beyond a rate-only impact because it allows Northern and a shipper to agree to increase a shipper's contract demand at agreed-upon intervals, and may require Northern to construct new facilities to meet new demand. Distributors assert that this provision provides an undue preference to that shipper, and would have a detrimental effect on firm shippers that desire increases in contract demand, but do not have a bona fide bypass option.

14. The Commission finds that, contrary to these assertions, its findings in *DTI* do not require that the Commission reject the instant filing. In that proceeding, DTI proposed, as part of a negotiated rate agreement, a full service requirement provision as part of the contract with an individual shipper.[7] The Commission stated that it permitted negotiated rate provisions that relate to contract prices to the level of service taken, but only if such a provision affected only the rate for the service and did not result in the customer receiving a different quality of service than that provided other customers under the tariff. However, the Commission found that the full requirements provision of the contract proposed by DTI constituted "a term and condition of service materially different than as provided under the FT Rate Schedule and does not appear to be a provision that affects only the rate for the service."[8] Therefore, the Commission required that the pipeline delete its proposed full requirements provision.

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[6] Distributors Comments at 6, *citing*, *Dominion Transmission, Inc*., 94 FERC ¶ 61,057 (2001) (*DTI*).

[7] DTI stated that its contract did not require that the shipper take any specific level of service but that if the shipper burned gas at its plants, it was obliged to use the DTI service in exchange for receiving the negotiated rate. *DTI* at 61,260.

[8] *DTI* at 61,260; *See also, Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 at 62,003 (2001) ("negotiated terms and conditions of service includes any provisions that result in a customer receiving a *different quality of service than that provided other customers under the pipeline's tariff.*") (emphasis added).

15. However, the instant case presents a different situation to that found in *DTI*. Here the pipeline does not propose to impermissibly negotiate a term or condition of service, such as a full requirements provision, that is materially different from the service provided under the applicable rate schedule with an individual customer, as was the case in *DTI*. Rather, the pipeline proposes to place its full requirements provisions in its tariff as a part of Rate Schedules TF and TFX and, thereby, make the full requirements service generally available to all customers. This action relieves the concerns that necessarily arise when a pipeline attempts to negotiate a term or condition of service with a single shipper. Accordingly, the Commission finds that *DTI* is inapposite to the present situation and that the full requirements provision is acceptable for inclusion in the proposed rate schedules as modified.

16. Distributors, Terra and Koch raise several issues regarding the qualifications that Northern requires shippers to meet to avail themselves of full requirement service. Distributors argue that, in discussing full requirements provisions in its March 25, 2005 Order, the Commission stated that if Northern decided to file a full requirements service, in order to mitigate the risk of undue discrimination, Northern must include such a service in its tariff so that it may be generally available to all customers.[9] Distributors argue that by limiting the full service requirement option to shippers that have a bona fide alternative to bypass Northern, Northern fails to make the option generally available to all shippers that take firm transportation under Rate Schedules TF and TFX. Koch and Terra also request that Northern provide an explicit and objective definition of “bona fide” as it pertains to the bypass so that Northern will not have the option of rejecting a bypass proposal on a subjective basis.

17. Distributors add that Northern not only discriminates between shippers that can and cannot bypass its system, it gives itself full discretion to discriminate between shippers that claim they can bypass because Northern alone will determine whether or not the ability to bypass is bona fide. Distributors see no reason to limit this option to only bypassing shippers, asserting that bypassing shippers have no more right or need for the full service requirement option than other shippers. Moreover, Distributors contend that shippers that lack the ability to threaten bypass cannot obtain assurances that Northern will use its best efforts to obtain necessary approvals for construction of facilities to serve future demand as do those that qualify for such treatment under Nothern’s proposal. Distributors assert that Northern’s proposals elevate certain shippers to a super priority status to obtain future increases of contract demand and in requiring Northern to undertake the construction necessary to meet such increases. Distributors assert that the

[9] Distributors Comments at 8, *citing, Dominion Transmission, Inc*., 110 FERC ¶ 61,321 at P 21 (2005).

availability of standard interruptible or firm transportation rate schedules does not mitigate or justify the offering of favorable terms and conditions of service to only certain shippers.

18. In its answer, Northern asserts that it is impractical to attempt to define all possible bypass scenarios. Northern asserts that if a shipper believes it has a bona fide bypass option that Northern may dismiss, the shipper may call the FERC Hotline or file a complaint with the Commission.

19. In its March 23, 2005 Order, the Commission stated that, should Northern desire to provide full service requirements, it must mitigate the risk of undue discrimination among its customers by filing to place such a service into its tariff so that it may be generally available to all customers.[10] Northern acknowledges this as it states that it is adding the full requirements service option "as a generally available provision of Rate Schedules TF and FTX."[11] As discussed below, the Commission finds that Northern's proposal to require that shippers must show that they have a bona fide alternative to bypass Northern in order to avail themselves of the full requirements service is unduly discriminatory.

20. Under its proposal, Northern agrees to construct new facilities and exercise commercially reasonable best efforts to secure approvals for such construction in order to permit the full requirements shipper to increase its demand, if mutually agreeable. This ability to increase contract demand could be a valuable service for a customer that expects its service needs to increase in the future. The full requirements provision is proposed by Northern as an open-access service. As such, the service must be available to all customers including those that cannot present alternatives that bypass Northern (captive customers), subject to the availability of capacity.[12] The only exception would be if Northern could show that the benefit for its system of granting full requirements service to certain customers can not be obtained if all customers, including captive

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[10] *Northern Natural Gas Co.*, 110 FERC ¶ 61,321 at P 21 (2005).

[11] Northern Transmittal Letter at 2.

[12] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436 , FERC Stats. and Regs., Regulations Preambles 1991-1996 ¶ 30,665 at P 31,516-17 (1985). *See also*, 18 CFR § 284.7(b)(1) (2004).

customers, are allowed to avail themselves of this service.[13] Northern has not shown that it must deny its captive customers such a benefit in order to accomplish its aims in offering a full requirements service.

21. As discussed further below, the Commission is accepting Northern's proposal to condition its obligation to build new facilities to satisfy the full requirements load growth on the shippers meeting "the economic feasibility requirements for construction of facilities." Section 4 of Northern's General Terms and Conditions defines the economic feasibility test as follows:

> An economic feasibility test will be performed to determine when Northern may charge Shipper/Purchaser such costs. Such test shall reflect the cost of the facility to be constructed, the incremental cost related to such facilities and the revenues which Northern estimates to be generated attributable to the facilities, all of which will be based on a discounted cash flow rate of return methodology.

22. If Northern were to permit its captive customers access to its full requirements provisions Northern's construction feasibility test would apply. Therefore, Northern would not have to construct additional facilities for such customers if the test was not met. The Commission also observes that its discount policies permit Northern to limit any discounts for its services to customers with competitive alternatives. Therefore, Northern need not offer discounts to captive customers requesting the full requirements service. Thus, Northern would have the opportunity to recover its full costs of providing full requirements service from any customer that requests such service. Northern has also provided no operational reason why it cannot offer this service to captive customers under the same conditions as it is offering this service to non-captive customers. Accordingly, the Commission finds that Northern must file revised tariff sheets to make its full requirements provision available to all shippers including captive customers.

23. Koch and Terra assert that the Commission should require Northern to implement a rate cap so that Northern may not charge a shipper that agrees not to bypass it a rate that exceeds the 20-year amortized cost of the facilities the shipper proposes to use to bypass

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[13] *Associated Gas Distributors, et al., v. FERC*, 824 F.2d 981, 1011 (D.C. Cir. 1987); *Maryland Peoples Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985). *See also United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (finding that the Commission had not adequately justified denying no-notice service to former bundled firm-sales customers).

Northern. In response, Northern asserts that such a proposal is unworkable since Northern would not have knowledge of the actual cost of the proposed facilities (*i.e.*, if the bypass does not occur, the facilities will not be built and actual costs not known). Northern adds that it is typically not privy to proposed bypass plans. Northern also contends that whether a shipper negotiates to retain its service on Northern or bypass Northern is a matter between it and the shipper, and the commission should not limit Northern in its ability to agree to a rate for its service.

24. The Commission will not require Northern to implement Koch's and Terra's recommendation. In addition to restricting Northern's rate flexibility, the actual costs of facilities that would never be constructed could not be determined with any certainty. As discussed, the Commission finds that Northern may charge a rate up to the maximum rate set forth in its tariff for this service, together with any approved charge to recover the cost of facilities Northern builds pursuant to its proposed tariff provisions.

25. Koch and Terra also seek assurances that, if new facilities are required to serve increased requirements of a shipper that has agreed not to bypass Northern, the cost of those facilities should only be borne by Northern and/or the respective shipper, and not other shippers. In its answer, Northern contends that the issue of cost recovery should be addressed when Northern files a general rate case. The Commission finds that this is an issue to be determined in a general Natural Gas Act (NGA) section 4 rate case and will not predetermine the issue here.

26. Distributors assert that Northern made the instant filing, not to provide a new service to shippers, but to "shore up" its CenterPoint agreements the Commission accepted subject to conditions in the Docket No. RP05-181-000 proceeding. Distributors asserts that Commission should not use the instant filing to justify the CenterPoint agreements or to automatically approve the instant filing because of the Docket No. RP05-181-000 proceeding. The Commission agrees with the Distributors' argument to the extent that the instant proposal is a separate NGA section 4 proposal and it must be judged on its merits as was the Docket No. RP05-181-000 proposal.

27. Cornerstone adds that full service requirements provisions are anticompetitive because they shield the pipeline from future competitive pressures and that they afford certain shippers an unfair advantage *vis a vis* the other customers of the pipeline with which it competes. Cornerstone argues that the substantial discounts proposed to be given to CenterPoint in Docket No. RP05-181-000 are a key component of the full requirements service and would give Centerpoint an unfair advantage not only in retaining retail load but in future load that may require pipeline additions. Cornerstone argues that the Commission should not approve the proposed tariff sheets until it acts on rehearing of its March 23, 2005 Order in Docket No. RP05-181-000.

28. The Commission denies Cornerstone's request. First, no discounts are offered in the instant filing for any particular transaction, since this filing simply changes a generally available tariff. Second, the Commission has fully addressed and mitigated any potential discrimination in availability of full requirements service or Northern's construction policies for future load needs by requiring such services to be offered to all customers. Third, as the Commission stated, the instant proposal is a NGA section 4 proposal that it must judge on its own merit. The fact that in this instance the proposal is closely related to another filing by Northern need not stay any Commission decision on the proposal before it.

29. Moreover, the Commission finds that it is not anticompetitive to present a customer with a choice of purchasing a firm service if the customer has a viable alternative. For example, the Commission has previously found that firm service with its accompanying reservation charge would have a tendency to bind a customer to the pipeline.[14] However, the Commission stated that:

> The shipper can weigh whether the advantages of obtaining a firm right to service on the pipeline are worth the limits which the reservation charge will inevitably impose on the desirability of its switching to supplies on another system. The shipper can also consider such other matters such as how long it wishes to commit itself to firm service under a two-part rate. These are the types of choices that consumers are constantly required to make in a competitive marketplace. The Commission concludes that, as long as the customer has a choice whether to so commit itself (and assure itself of firm service), we cannot find that a reservation fee unduly limits a customer's competitive alternatives.[15]

30. In the instant case, Northern offers an alternative under which a customer may obtain its full requirements in return for certain benefits. Northern has not required that a customer use this service and, continues to provide both firm and interruptible services to its customers. If a customer wishes to avail itself of this full requirements service, it may consider the same issues presented above, including the length of time it wishes to contract for and whether the benefits its obtains are worth restricting its alternatives. In

[14] *Transcontinental Gas Pipe Line Corp.*, 76 FERC ¶ 61,021 at P 61,061-63 (1996).

[15] *Id.* at 61,060.

the presence of viable service alternatives for the customer the Commission cannot find that Northern's proposal is anticompetitive.

31. Several parties urge the Commission to suspend Northern's filing for five months. Distributors recommend that the Commission convene a technical conference. Northern and CenterPoint oppose any suspension of the proposed tariff sheets. The Commission finds that a suspension and technical conference are not necessary in this proceeding. Northern has fully explained its proposal and provided sufficient information for the Commission and other parties to determine its intent and whether it conforms to Commission policy.

The Commission orders:

(A) The tariff sheets listed in footnote No. 1 are accepted to be effective May 5, 2005, subject to the condition in the body of this order and the ordering paragraph below.

(B) Northern is directed to file revised tariff sheets within 15 days of the issuance of this order to make its full requirements provisions available to all shippers as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.